

### Attention legacy officers: is a post-death claim for NHS continuing care appropriate?

Elderly people have to pay for their care as they lose the ability to look after themselves, whether they are cared for in their own home, or in a residential care setting. These charges may be unlawful, and it is possible for them to later be substantially reclaimed by their executors.

There have been a number of examples:

- Mrs R suffered a mental health crisis resulting in her detention in a mental health hospital. She was discharged into residential care and remained there for nearly eight years. During that time she continued to need after-care services which the local authority were under a duty to supply and for which she was charged. Her estate on death was valued at £190,000. Her executors made a claim for re-inbursement on the basis that the NHS was responsible for the cost of her care at the home. After being reimbursed for unlawfully charged services her

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estate increased to £500,000.

- Mr C suffered from dementia. After attending day-care centres for some years it was decided that he should be cared for in a residential home. His condition deteriorated and it became necessary for him to move into a nursing home. He continued to pay his own nursing home fees until his death years later. The NHS has a duty to pay for the care of a person whose needs are more than social services can be expected to provide. Mr C's executors made a retrospective claim for an NHS continuing care award and his estate was reimbursed £200,000.

Even when care has been provided at home by a paid carer or (occasionally) by a relative, the NHS can still be responsible for the costs of that care provided that the level of care is more than social services can be expected to provide. If you have an estate where this scenario may have arisen, it is worth investigating the matter further.

### Kershaw v Micklethwaite (2010)

The decision in the recent case of *Kershaw v Micklethwaite* [2010] EWHC 506 (Cb) outlined the reluctance with which the court will exercise its powers to remove an executor from office, in the absence of very good cause.

The applicant applied for the removal of all or some of the respondent executors of his mother's Will, under the Administration of Justice Act 1985, section 50. The deceased had appointed her two daughters and her accountant as her executors. The applicant made various submissions in respect of the respondents' conduct, including an assertion that they had not kept him informed and that there had been a breakdown in relations between them.

It was found that the respondents had not provided a copy of the grant of probate to the applicant until a few months after it had been issued, nor had they provided him with documents until some time after

they were due to be disclosed; however, even though the executors could have dealt with matters more efficiently, this was not sufficient to justify their removal. Further, it was held that friction and hostility were not in themselves reasons for removing an executor. All three respondents had had the benefit of advice from a solicitor (which they had acted upon), had in depth knowledge of the family's affairs and had dealt with matters in a cost effective manner. Further, the deceased had given much thought to the appointment of the respondents, which weighed heavily against their removal. Replacing the existing executors with new ones would also be very expensive.

In all the circumstances, the applicant had failed to show that the estate and the interests of the beneficiaries would not be properly administered with the respondents remaining in place, so his application to remove the executors was dismissed.

### Cross-border donations

The European Foundation Centre has recently discovered that the UK is one of only six countries that have fully complied with a European directive requiring them to give tax relief on donations their taxpayers make to charities in the UK and other EU countries.

Some countries have not complied at all, whilst others have limited the relief, meaning foreign donations to UK charities are likely to attract less tax relief than donations made in the UK to foreign charities.



Angela Bowman,  
head of charity  
probate litigation

## The Bribery Act 2010: its significance for charities

The Bribery Act ("the Act") is expected to come into force later this year and received Royal Assent in April. The election has made the precise timing uncertain. The Act introduces a series of criminal offences with penalties for individuals and organisations. Charities, their employees and volunteers will need to be compliant and should take steps now to ensure their anti-corruption policies are appropriate.

### New offences

The Act makes it a criminal offence to both give and accept a bribe. It will be an offence to offer or promise a financial advantage to an individual to bring about or reward the improper performance of a relevant function. A "relevant function or activity" includes all functions of a public nature, as well as activities connected to a business. The activities do not have to be connected to the UK and it is an offence to bribe a foreign official. "Improper performance" implies an expectation that a function will be performed in good faith and impartially and that expectation has not been fulfilled. Organisations' representatives face imprisonment and/or a fine if found guilty of an offence under the Act.

### Impact on commercial organisations

For commercial organisations a new offence is introduced of failing to prevent bribery being committed by persons who represent their business. It is expected that a charity and its trading subsidiaries will need to comply. The offence carries a criminal penalty (a fine or imprisonment) and will ensure unwelcome publicity for a culpable organisation. If convicted, an organisation is prohibited from tendering for public sector contracts.

There is a defence if an organisation can show it had "adequate procedures" in place to prevent bribery. The Government will produce guidance before the Act comes into force, but we advise charities to pre-empt this and review and update their existing policies.

### Preparation for the Act

A charity's policy should prohibit bribery in any form. It needs to inform staff and it will help to demonstrate that there are adequate procedures in place. An anti-bribery policy should include: a statement of values; a code of conduct; detailed policies on whistleblowing, the acceptance of gifts and facilitation payments; as well as provisions for vetting external agents. Charities should review their commercial contracts and consider including in them clauses that replicate those prohibiting bribery and corruption commonly used by public sector bodies.

Please contact Rachel McCollough, partner in the corporate team, for further information on [rachel.mccullough@henmansllp.co.uk](mailto:mccullough@henmansllp.co.uk)



## The new Office for Civil Society

The Office of the Third Sector has been renamed the Office for Civil Society and Tory Nick Hurd will be the Minister for Civil Society, the Cabinet Office has confirmed.

Hurd's role is at the more junior parliamentary secretary level compared to the role of the previous charities minister Angela Smith, however a spokesman for the Office for Civil Society said that this did not mean the role was any less important. "I don't think the sector should worry about that," he said. "What will matter are the policies."

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## Significant clarifications to discrimination law in the UK

Since our last newsletter two cases involving the charity sector have resulted in important clarifications to the UK's discrimination law.

In *X v Mid-Sussex Citizens Advice Bureau* a volunteer part-time adviser in welfare law at the Citizens Advice Bureau (CAB) left alleging that her departure was caused by the CAB's discrimination against her on grounds of her disability.

The Employment Appeal Tribunal (EAT) concluded that the adviser was not protected by the Disability Discrimination Act ("DDA") because there was no contract between her and the CAB and her position with the CAB was not an "occupation" because it was unpaid.

In *Amnesty International v B Ahmed*, Mrs Ahmed brought a claim under the Race Relations Act against her employer, Amnesty International, for its failure to promote her to a "Sudan researcher" position because of her Northern Sudanese ethnicity.

Amnesty contended that it had not offered her the promotion because to do so would have compromised its perceived impartiality in the Sudanese conflict and because appointing a researcher of Northern Sudanese ethnicity would have exposed Mrs Ahmed and others to unacceptable safety risks.

The Employment Tribunal (ET) found that Amnesty had directly discriminated against Mrs Ahmed on the grounds of race. The EAT dismissed Amnesty's appeal. Direct discrimination cannot be justified and so Amnesty could not escape liability despite its worthy motives for not appointing Mrs Ahmed.

It is of note that the EAT stated that employers in a similar position to Amnesty might apply the "genuine occupational requirement" defence. The defence allows an employer to discriminate against an employee if being a particular race or of specific ethnic or national origin is a genuine and determining occupational requirement for a role and it is also deemed to be proportionate to apply that requirement.